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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-008340-001 DT 08/18/2016

HON. ROSA MROZ

CLERK OF THE COURT
J. Matlack
Deputy

STATE OF ARIZONA

PATRICIA L STEVENS
MITCHELL S EISENBERG

v.

KURT DUSTIN COLEMAN (001)

RICHARD K MILLER
GREGORY J NAVAZO

CAPITAL CASE MANAGER

RULING

Defendant's Motion to Limit the State's Penalty Phase Rebuttal Evidence

The Court has considered the Defendant's Motion to Limit the State's Penalty Phase Rebuttal Evidence, the State's Response, and the Defendant's Reply. The Court does not need oral argument to decide this issue.

The Defendant requests that the Court's issue a pretrial ruling determining what is appropriate mitigation rebuttal evidence. The State counters that the motion is premature as the Court is unaware – other than by Defendant's representations –of the thrust of Defendant's mitigation; and also that the Defendant's attempts to limit rebuttal and to require proof by a clear and convincing standard are without merit. The Defendant replies that he requires pretrial guidance as he develops his mitigation phase strategy.

A.R.S. §13-751(G) defines mitigating circumstances "as any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." The statute tracks our Supreme Court's earlier holding in *State v.*

Clabourne, 194 Ariz. 379, 983 P.2d 748 (1999) *(Clabourne II),* "Mitigating evidence is 'any aspect of the defendant's character or record and any circumstance of the offense *relevant* to determining whether a sentence less than death might be appropriate.' *State v. Spears,* 184 Ariz. 277, 293, 908 P.2d 1062, 1078 (1996)."

Our Supreme Court has also held that "[d]uring the penalty phase, the state may offer evidence that is relevant to determining if the mitigation is sufficiently substantial to warrant leniency." *Leteve,* 237 Ariz. 516, 528–29 ¶ 47, 354 P.3d 393, 405–06 (2015). The Court has rejected the "dump-truck aggravation" argument; instead, it has specifically stated that "jurors may consider additional evidence presented in the penalty phase that bears on whether the defendant should be shown leniency." *State v. Pandeli,* 215 Ariz. 514, 527, ¶ 41, n.3, 161 P.3d 557, 570 (2007).

More recently, in *State v. Goudeau* 239 Ariz. 421, 372 P.3d. 945, 995 (2016), the Supreme Court held that "[a]dmissibility of rebuttal evidence turn[s] on whether it [is] relevant to the existence of mitigation sufficiently substantial to call for leniency, A.R.S. § 13-752(G) and, if so, whether the evidence was unfairly prejudicial." *State v. Goudeau,* 239 Ariz. 421, 372 P.3d. 945, 995 (2016). In *Goudeau* the Supreme Court determined that certain transcripts provided background information about the defendant while also including unobjected-to inflammatory content. Although potentially objectionable as inflammatory and unduly prejudicial as background information alone, nonetheless in connection with the expert's report the transcripts provided context for the expert's conclusions such that the probative value outweighed any prejudicial impact.

The Defendant in this case anticipates the thrust of his mitigation "is that he is a methamphetamine addict and that his addiction stems from risk factors including genetics, learning difficulties, attention difficulties, amphetamine prescriptions, trauma, depression, and impulsive behavior", and advises that Defendant "will not be portrayed by the defense as a person of good character, honest, or integrity", that "the defense will not deny his criminal past", and that the "defense will not try to show that he is not a violent person."

The State notes, accurately, that the fact that Defendant chooses not to contest a fact does not preclude the State from introducing evidence of the fact. The relevance and admissibility of evidence is not relieved by a defendant's tactical decision not to contest a particular fact or issue, although the Court will still consider Evidence Rule 403 in deciding admissibility.

The Defendant anticipates that the State will seek admission of the following twenty-nine items of evidence, based on the State's disclosure:

1. An uncharged aggravated assault on 8/03/03 in which Mr. Coleman allegedly cut a victim's throat in a possible meth lab in a trailer park. Neither Mr. Coleman nor the victim wanted to press charges and the case was closed. (Bate 3812).

2. An uncharged assault on 12/27/93 in which Mr. Coleman and four other inmates allegedly assaulted an inmate who owed money for cigarettes. No charges were brought. (Bate 3885).

3. A custodial interference incident on 9/11/90 in which Mr. Coleman, a seventeen year old boy, was watching a six month old girl when she was improperly taken by her grandmother. No charges were filed. (Bates 3896-3902).

4. An uncharged burglary on 9/17/90 in which Mr. Coleman was suspected of stealing a bike from a shed. Mr. Coleman was reported as a runaway and a warrant was issued for his arrest from Mesa Juvenile Court. The case was ultimately closed because there was insufficient evidence to file a complaint. (Bates 3903-3913).

5. An uncharged burglary on 4/11/91 in which Mr. Coleman entered a backyard, looked in windows and entered an unlocked house looking for a female acquaintance. Mr. Coleman was eventually apprehended with a marijuana pipe in his possession. The case was forwarded to the Maricopa County Attorney's Office when Mr. Coleman turned eighteen years old. (Bates 3922-3929 and 3930-394).

6. An aggravated assault on 9/1/91 in which Mr. Coleman was a witness to two men assaulting another man with a crow bar. No charges were filed against Mr. Coleman because he was a witness. (Bates 3935-3944).

7. An armed robbery on 9/19/91 in which Mr. Coleman entered a store with two other individuals who threatened the employee with a hatchet and then took several pizzas. Coleman was not charged. (Bates 3945-3967).

8. A burglary on 10/16/91 in which Mr. Coleman was suspected of trying to burglarize a storage locker. Mr. Coleman reached a plea agreement after a citation for misdemeanor trespass was issued. (Bates 3968-3976).

9. Suspected possession of stolen property on 7/28/92 in which Mr. Coleman helped his friend paint a stolen car. A complaint and warrant were filed for possession of stolen property against Mr. Coleman and his friend. (Bates 3977-3984).

10. An incident on 9/12/02 in which Mr. Coleman allegedly gave the Scottsdale Police a false name and ran from the scene. At the time, Mr. Coleman had a warrant for his arrest for driving on a suspended license. Mr. Coleman was convicted of misdemeanor false reporting. (Bates 4245-4251).

11. Possession of marijuana and paraphernalia charges on 2/17/16 in which Mr. Coleman's daughter had marijuana, a lighter and foil in shopping bag that she claimed was her cousin's. No charges against Mr. Coleman. (Bates 4292-4300).

12. An email on 3/15/16 from Dr. James Seward to Detective Keland Boggs to remind Boggs that Seward will ask him his opinion on how likely it is that Mr. Coleman would have witnessed fifteen to twenty major acts of violence in prison based on where Mr. Coleman is housed. (Bate 4235).

13. A transcript of an interview of Det. Boggs conducted by Dr. Seward on 2/18/16 that discusses gangs. (Bates 4326-4369).

14. A transcript of an interview of James Duvaul, informant, conducted by Dr. Seward on 2/27/16 that discusses Mr. Duvaul's opinions of Mr. Coleman's involvement in fire crew and, allegedly, the Aryan Brotherhood gang, where he allegedly got tattoos and "beat people up." The transcript also discusses Mr. Duvaul's opinions of Mr. Coleman being nicknamed "Solo" and wanting to be on his own; being nervous when he was on methamphetamine; having empty eyes and a blank expression after the murder; and Mr. Coleman's alleged plan's [sic] to go to Belize because they do not have extradition. (Bates 4370-4381).

15. A transcript of an interview of Cindy Melvin, conducted by Dr. Seward on 2/11/16 that discusses Ms. Melvin's opinions on: Mr. Coleman being institutionalized; Mr. Coleman's alleged involvement in the theft of her dishes and her husband's rifle; Mr. Coleman being a follower; Mr. Coleman's alleged involvement in a drug deal gone wrong where Mr. Coleman slit someone's throat but did not cause a serious injury; Mr. Coleman allegedly going to Colorado when he was not supposed to; Mr. Coleman not socializing when he was in Colorado; Mr. Coleman spending almost all of his time in the bathroom with Colleen Melvin when he was in Colorado; and Mr. Coleman allegedly manipulating people for drugs and money. (Bates 4401-4448).

16. A transcript of an interview of Merrill Simons conducted by Dr. Seward on 3/24/16 that discusses Mr. Simon's opinions that Mr. Coleman had said that he would smoke pot until he dies and Mr. Coleman was called "Solo" because he was a loner. (Bates 4449-4464).

17. An LAPD police report of a robbery on 8/19/87 in which Mr. Coleman and another individual admitted to robbing a convenience food mart. (Bates 4593-4610).).

18. A report created by Maricopa County Attorney's Office Detective Bruce Foremny dated 4/13/16 stating Det. Foremny's opinion that Mr. Steven Tate and Mr. Coleman were likely not together at the juvenile detention center but it was likely that they were at the Canyon State Academy and Adobe Mountain at the same time. The report includes Det. Foremny's interview of Gail Horner, a former corrections officer at the Department

of Corrections, in which Ms. Horner said Mr. Tate did not report sexual assaults to her but that he was picked on by other kids. The report also includes Det. Foremny's interview of Tanya Martinez, a corrections officer at the Department of Juvenile Corrections, on 4/16/16 in which Ms. Martinez says records are purged when individuals turn twenty four years old and that there is no record of Mr. Tate's sexual assault complaint at Adobe Mountain or the Department of Juvenile Corrections. (Bates 5849-5851).).

19. Tattoo Progression by Sergeant Lien and Detective J. Bocock that describe [sic] one of Mr. Coleman's tattoos as being authorized by an Aryan Brotherhood member.

20. Document on 4/5/04 that charges Mr. Coleman with possession or use of dangerous drugs for an incident on 1/6/04. (CR2004-036235-001SE) (Bate 5971).

21. Document on 2/27/12 that charges Mr. Coleman with one count of third degree attempt to commit burglary and one count of possession of burglary tools for an incident on 1/2/12 in which Mr. Coleman allegedly tried to break in to a postal box and a subsequent search of his car uncovered methamphetamine, a drill bit and a knife. The document also includes the Plea Agreement filed 2/27/12 in which Mr. Coleman pled guilty to one count of third degree attempt to commit burglary. (CR2012-100129) (Bates 5982-5990).

22. A transcript of an interview of Larry Nuciforo, Mr. Coleman's former employer, conducted by Dr. Seward on 6/7/16 that discusses Mr. Nuciforo's opinions that Mr. Coleman "let him down" enough that he was fired and that Darin Tsosie, Mr. Coleman's supervisor, said Mr. Coleman would not work or show up most of the time. (Bates 6111-6116).

23. A print out from the prison of the programs Mr. Coleman has completed. (Bates 6118).

24. Email from MCAO employee Jerry Dunn to Patricia Stevens detailing the AVP program. (Bates 6119-6120).

25. A transcript of an interview of Detective Parra conducted by Dr. Seward on 6/22/16 that discusses Det. Parra's opinions of why Mr. Coleman would have money on his books and that usually inmates have money on their books from people who are not related to them because they are running some kind of operation. Det. Parra also gives the examples of paying extortion money, drugs and poker money. (Bates 6129-6131).

26. A transcript of an interview of Mr. Coleman conducted by Detective Spina and another Mesa Police Officer on 2/21/12 that discusses information that Mr. Coleman might have about several fake identification cards and a guy named Rodney. The interview also discusses why Mr. Coleman missed a court date and a subsequent warrant was issued for his arrest. (Bates 6132-6145).).

27. Report on 1/12/00 of Mr. Coleman's sister, Kimberly "Dawn" Coleman, involved in a forgery incident on 1/12/00. (Bates 6352-6355).

28. An email string on 6/26/16 between Dr. Seward and Detective Boggs in which Det. Boggs defines "putting in work" as "conducting assaults, collections, drug/money distribution, or other criminal activity on behalf of a physical violence directed by the gang." (Bates 6356-6357).

29. An email string on 6/27/16 between Dr. Seward and Detective Boggs in which Det. Boggs discusses his opinions on whether Mr. Coleman could have witnessed fifteen-twenty acts of serious violence in prison. (Bates 6358-6359).

The Court has concerns about the relevance of certain of the information. The Court also has concerns about whether the probative value of the information is substantially outweighed by its prejudicial effect or confusion of the issues. As to the uncharged other acts, the Court is particularly concerned that the penalty phase of this trial will devolve into a series of mini-trials on whether the Defendant committed the other acts. However, the Court has no context for each of the items and declines to rule on evidence that is "anticipated" but that may not even be offered.

If requested at a penalty phase, the Court will address any objection to specific items of rebuttal, including whether the State's proffered rebuttal is relevant to the identified mitigator, and then will consider Rule 403, Ariz. R. Evid. Rule 403 permits the Court to exclude evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

IT IS ORDERED deferring until the penalty phase the Court's ruling on the twenty-nine potential items of rebuttal evidence.

Both the State and the Defendant cite *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, which held:

> We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

97 S. Ct. at 1207.

To ensure that the Defendant has an "opportunity to deny or explain,"

IT IS ORDERED that the State identify for the Defendant which of the above referenced materials that it "intends to use" and the witnesses it "intends to call" in rebuttal. *See* Rule 15.1(i)(5)(b), (d), Arizona Rules of Criminal Procedure. Once the State has identified the materials that it actually intends to use at the penalty phase, the Defendant may requests the Court to rule on those items.

In his motion, Defendant also claims that the State must prove any uncharged acts, or other evidence rebutting his mitigation, by Rule 404(b) standards. The State disagrees. Our Supreme Court has addressed Rule 404(b)'s inapplicability in the context of the penalty phase in connection with the admission of uncharged prior acts in *State v. Chappell*, 225 Ariz. 229, ¶¶34-41, 236 P.3d 1176 (2010). The trial court allowed the State to present evidence of prior injuries the child victim suffered while in the defendant's care as rebuttal to mitigation. The evidence included e-mails from the victim's mother and the mother's police interviews. The Court noted that it had explicitly rejected the argument that Rule 404(b) and the Court's related case law governed the admission of other acts evidence during the penalty phase. The analysis is whether the evidence is relevant, not unfairly prejudicial, and if hearsay, bears sufficient indicia of reliability. The Court found that because the State presented direct and circumstantial evidence of the child's prior injuries and their surrounding circumstances, including photographs and testimony from lay and expert witnesses, which supported an inference that the defendant was responsible for those injuries and corroborated the mother's statements, the statements bore sufficient indicia of reliability.

THE COURT FINDS that the proper mitigation rebuttal analysis is whether the evidence is relevant, is not unfairly prejudicial, and if hearsay, bears sufficient indicia of reliability. The State need not prove the other acts by clear and convincing evidence in the penalty phase.

IT IS ORDERED granting in part, denying in part, and holding in abeyance in part, the Defendant's Motion to Limit the State's Penalty Phase Rebuttal Evidence, in accordance with the above.

State's Motion to Preclude Witnesses

The Court has considered the State's Motion to Preclude Witnesses filed on August 2, 2016, the Defendant's Response, and the State's Reply. The Court does not need oral argument to decide this issue.

The State requests that the Court preclude the witnesses listed in the Defendant's Second Supplemental Notice of Surrebuttal Witnesses filed on July 28, 2016.[1] These witnesses are record custodians who have written letters indicating that there are no records available. The State argues that speculation as to the existence and content of the records is not permissible or relevant. The Defendant argues that it is calling these record custodians so that the jury does not speculate why the defense is presenting a partial life history and that the absence of public records can be admitted, citing Evidence Rule 803(10). However, Evidence Rule 803(10) simply states that the absence of the public record is not excluded by the rule against hearsay. It does not state that it is admissible regardless of whether it is relevant or unfairly prejudicial.

"Mitigating evidence is 'any aspect of the defendant's character or record and any circumstance of the offense *relevant* to determining whether a sentence less than death might be appropriate.' *State v. Spears*, 184 Ariz. 277, 293, 908 P.2d 1062, 1078 (1996)." Based on the Defendant's stated reason for wanting to call these record custodians, the Court does not find that it is relevant. Calling these record custodians would also invite the jury to speculate that if these records existed, the contents would have been favorable to the Defendant.

IT IS ORDERED granting the State's Motion to Preclude Witnesses.

The Court does not foreclose the possibility that these record custodians' testimonies may become relevant depending on how the penalty phase progresses. If these witnesses' testimonies become relevant, the Defendant may request that the Court allow them to testify.

[1] These witnesses are: (1) Gloria Aiston, Maricopa Integrated Health Systems; (2) Gary Slayton, Tri City Mental Health Services; (3) Megan Masarky, Canyon State Academy; and (4) Terri Caraday, Arizona Department of Juvenile Corrections.